92-1225

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1992

ELLEN MAE RANDLEMAN,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in a criminal case, the Fifth and Fourteenth Amendments prohibit the use of inculpatory statements made by an accused to a psychiatrist in the course of a court ordered competency examination, where the examination was conducted over the objection of the accused, and where the record is silent as to whether *Miranda* warnings were given or a waiver of rights was obtained.
2. Whether permitting the prosecution in a criminal case to use an accused's inculpatory statements made to a psychiatrist pursuant to a court ordered competency examination unconstitutionally forces the accused to choose between exercising her Fifth Amendment right to remain silent or exercising her due process right to seek out a possible defense of mental disease or incompetency to stand trial.

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In The
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ELLEN MAE RANDLEMAN,
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v.

STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner, Ellen Mae Randleman, petitions the Court for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas.

OPINION BELOW

The opinion of the Supreme Court of Arkansas was rendered on September 21, 1992 and is reported as *Randleman v. State*, 310 Ark. 411, 837 S.W.2d 449

(1992). It is reprinted in the Appendix to this petition at A1.

JURISDICTION

The Supreme Court of Arkansas decided this case on September 21, 1992. Justice Blackmun granted Randleman's application to extend the time for filing this petition until January 19, 1993. The Petition for Certiorari is therefore timely.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law; . . . .

STATUTES INVOLVED

Ark. Code Ann. § 5-2-307 (1987) provides:

> Any statement made by a person during

examination or treatment shall be admissible as evidence only to the extent permitted by the Uniform Rules of Evidence, but only if such statement is constitutionally admissible.

Ark. Code Ann. § 16-86-102(a) (1987) provides in pertinent part:

> Whenever a prosecution for any crime has been instituted in the circuit court by indictment or information and . . . the circuit judge has reason to believe that the defense of insanity will be raised on behalf of the defendant and will become an issue in the cause or shall be of the opinion that there are reasonable grounds to believe that the defendant was insane at the time of the alleged commission of the offense, the judge shall postpone all other proceedings in the cause and shall either enter an order directing that the defendant undergo examination and observation by one (1) or more qualified psychiatrists at a local regional mental health clinic or center or shall commit the defendant to the Arkansas State Hospital for examination and observation.

RULES INVOLVED

Ark. R. Evid. 503(d)(2) provides:

> If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular pur-

pose for which the examination is ordered unless the court orders otherwise.

Fed. R. Crim. P. 12.2(c) provides in pertinent part:

> No statement made by the defendant in the course of any examination provide for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

STATEMENT OF THE CASE

The petitioner, Ellen Mae Randleman, was charged in the Stone County, Arkansas Circuit Court with two counts of delivery of a controlled substance and four counts of possession of a controlled substance with intent to deliver. (T. 79)[1] On March 22, 1990, August 6, 1990, and November 30, 1990, she moved for continuances, stating, among other things, that she was "undergoing intensive psychological testing and evaluation." (T. 24, 28, 32) Additionally, in her response to the State's motion for discovery she stated that she would defend the charges against her "on the grounds of

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[1] References to "T." are to pages of the state court record.

general denial and that the State of Arkansas, more particularly the Drug Task Force, did not perform or cause to be performed the necessary psychological testing and evaluation of the defendant before employment as an undercover operator." (T. 58)[2]

The State subsequently moved the trial court to order Randleman to submit to a psychiatric examination at the Arkansas State Hospital to determine her fitness to proceed and her mental capacity at the time of the alleged crimes. (T. 39-41) Randleman resisted the State's motion, specifically asserting that she had not raised a defense of mental disease or defect. (T. 71-72) Nevertheless, the trial court ordered the psychiatric examination "on its own motion" and on the ground that "it appears that the mental condition of the Defendant at the time of the alleged offense(s) and at the time of trial will be an issue herein." (T. 82-83)

Prior to the psychiatric examination, the prosecutor provided the state hospital with a copy of his investigative file in the case. (T. 405) During the course of the evaluation at the state hospital, Randleman was questioned by the examining psychiatrists about the charges against her. She made inculpatory statements to the psychiatrists, and the psychiatrists included those statements in their forensic report. They also ultimately concluded that Randleman was fit to proceed.

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[2] At the time of her arrest, Randleman was an undercover police officer with the Sixteenth Judicial District Drug Task Force.

At trial, the State called Dr. Wendall Hall, Forensic Medical Director of the Arkansas State Hospital, to testify about the statements that Randleman made. Randleman objected on Fifth Amendment grounds, stating: "But now he's fixing to get into this report, which is in violation of her Constitutional rights, it's in violation of her Fifth Amendment, it is self-incriminating, it has no bearing in this case." (T. 400) The trial court sustained the objection at that time. (T. 401-02)

Later, Randleman took the stand in her own behalf and denied that she had ever sold drugs or other contraband to anyone other than on the orders of a superior with the drug task force for whom she worked. (T. 708) During cross-examination, the State again sought to introduce the forensic report which contained the incriminating statements. (T. 709) Defense counsel again objected, stating:

> The Court ordered this young lady to appear at the hospital for an examination. That was a tacit order to her to talk to the hospital personnel. That is a Court order and to allow that to be used against her is worse than her statements to law enforcement. It's in effect a violation of her constitutional rights by a Court order. . . . [v]iolation of her fifth amendment rights, Your Honor. The Court ordered, anything she said should be protected under those rights.

(T. 710, 711)

The trial court overruled the objection, relying on Ark. Code Ann. § 5-2-307 (1987) and Ark. R. Evid.

503(d)(2). (T. 711) The State introduced the report into evidence as State's Exhibit 34. (T. 711-715) The State also questioned Randleman extensively about the statements in the report, reading through many portions verbatim. (*Id.*)

The jury convicted Randleman on all six counts. She appealed to the Arkansas Supreme Court, alleging *inter alia* that allowing the State to use the report in its cross-examination of her violated her Fifth Amendment privilege against self-incrimination under *Estelle v. Smith*, 451 U.S. 454 (1981), specifically because the record was silent regarding whether *Miranda* warnings were administered to Randleman before the exam. She also contended that she was unconstitutionally placed in the position of having to choose between exercising her due process right to pursue a possible defense of mental disease or defect and her Fifth Amendment right to remain silent during the competency examination.

The Arkansas Supreme Court affirmed. *Randleman v. State*, 310 Ark. 411, 837 S.W.2d 449 (1992). The court sought to distinguish *Smith*, reasoning that the incriminating statements in *Smith* were used to prove future dangerousness in the penalty phase of a capital trial, while the incriminating statements in Randleman's case were used "for the limited purpose of impeaching" her. *Id.* at 417, 837 S.W.2d at 452. The court further analogized the case to other cases in which custodial statements have been held to be inadmissible in the prosecution's case in chief but admissible for impeachment purposes when the accused took the stand. *Id.* at 418, 837 S.W.2d at 453 (citing *Mincey v. Arizona*, 437

U.S. 385 (1978)).[3] Finally, the court reasoned that the State's use of the statements was proper as a matter of state law because they were inconsistent with Randleman's trial testimony and fell within the exception to the physician and psychotherapist-patient privilege embodied in Ark. R. Evid. 503(d)(2) relating to court-ordered psychiatric examinations. The court stated that "[i]t seems logical that communications made to a psychiatrist should not be privileged when the court initiated the examination." 310 Ark. at 418, 837 S.W.2d at 453.

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[3] The court did observe that Randleman "did not raise the issue [of whether *Miranda* warnings had been given] at the trial court level." 310 Ark. at 418, 837 S.W.2d at 452. However, that statement by the court does not suggest that the issues presented here were not properly preserved. Randleman objected at trial on "fifth amendment" grounds and on the ground that the statements were "self-incriminating." Further, the Arkansas Supreme Court addressed the *Smith* issue on the merits by distinguishing *Smith* and analogizing Randleman's case to those in which non-mirandized statements may be used for impeachment under some circumstances. The court also ultimately concluded that Randleman's "Fifth Amendment right against self-incrimination" was not violated. 310 Ark. at 419, 837 S.W.2d at 453. The *Smith* issue is thus preserved for review by this Court under *Harris v. Reed*, 489 U.S. 255 (1989) because the Arkansas Supreme Court did not issue a plain statement that it was disposing of the case solely on state law grounds.

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS GUARANTEEING THAT AN ACCUSED'S STATEMENTS MADE IN THE COURSE OF A COMPELLED PSYCHIATRIC EXAMINATION WILL NOT BE USED AGAINST HER.

The decision below is contrary to the decision of this Court in *Estelle v. Smith*, 451 U.S. 454 (1981) that non-mirandized statements made in the course of a court-ordered psychiatric examination conducted over the objection of the accused may not be used by the prosecution. It also impermissibly sanctions impeachment with non-mirandized, compelled custodial statements in violation of the principles set forth in *Harris v. New York*, 401 U.S. 222 (1971)and its progeny. Finally, the decision conflicts with this Court's holding in *Simmons v. United States*, 390 U.S. 377 (1968) that an accused may not be forced to sacrifice one constitutional right (i.e., her Fifth Amendment privilege against self-incrimination) in order to assert another (i.e., her due process right to pursue a possible defense of mental disease).

I.

THE PRIVILEGE AGAINST SELF-INCRIMINATION IN CONNECTION WITH COMPELLED PSYCHIATRIC EXAMINATIONS

It was settled by this Court over ten years ago that when a defendant is ordered over his objection to submit to a psychiatric examination to determine his fitness to proceed, the defendant's Fifth Amendment privilege against self-incrimination prohibits the State from using incriminating statements made during the course of the examination unless the prosecutor can establish that *Miranda* warnings were administered to the defendant prior to the exam. *Estelle v. Smith*, 451 U.S. 454 (1981). "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him." *Id.* at 468.

In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Court clarified this principle and held that if the defendant herself requests a psychiatric evaluation in order to prove a mental status defense, she waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense.

> [I]f a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Id. at 422-23.

The facts of Randleman's case bring it squarely within the holding of *Smith* and remove it from the reach of the exception created in *Buchanan*.

First, and contrary to the apparent reasoning of the Arkansas Supreme Court, the applicability of the holding in *Smith* is not limited to penalty phase proceedings in capital cases where future dangerousness is at issue. To the contrary, Fifth Amendment protection under *Smith* also belongs to the defendant in the guilt phase of a non-capital case. "[T]he availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, ..." *Smith*, 451 U.S. at 462 (quoting *In re Gault*, 387 U.S. 1, 49 (1967)). Indeed, no other state court of last resort or federal court of appeals has distinguished *Smith* in the manner in which the Arkansas Supreme Court did in this case. *See, e.g., State v. Huff*, 325 N.C.1, 381 S.E.2d 635 (1989); *State v. Baker*, 180 W.Va. 233, 376 S.E.2d 127 (1988); *People v. Branch*, 805 P.2d 1075 (Colo. 1991); *R.H. v. State*, 777 P.2d 204 (Alaska Ct. App. 1989); *State v. Lindh*, 161 Wis.2d 324, 468 N.W.2d 168 (1991); *State v. Manfredi*, 213 Conn. 500, 569 A.2d 506 (1990); *State v. Shields*, 586 A.2d 655 (Del. 1990); *Hernandez v. State*, 805 S.W.2d 409 (Tex. Crim. App. 1990); *Erickson v. State*, 565 So.2d 328 (Fla. Dist. Ct. App. 1990); *Dickson v. State*, 533 N.E.2d 586 (Ind. 1989); *People v. Williams*, 197 Cal. App. 1320, 243 Cal. Rptr. 480 (1988); *State v. Hutchinson*, 111 Wash. 2d 872, 766 P.2d 447 (1989); *Brown v. Butler*, 876 F.2d 427 (5th Cir. 1989); *Cape v. Francis*, 741 F.2d 1287 (11th Cir. 1984).

Second, on the question of whether Randleman

was advised of her *Miranda* rights, the Arkansas Supreme Court has already acknowledged that the record is silent. *Randleman*, 310 Ark. at 417-18, 837 S.W. 2d at 452. The burden is upon the prosecution to demonstrate that the warnings were given. *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) ("[b]ut unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him"); *United States v. Frazier*, 476 F.2d 891, 892 (D.C. Cir. 1973) (*en banc*); *Tague v. Louisiana*, 444 U.S. 469 (1980). Further, it is impermissible to presume from the silent record in this case that *Miranda* warnings were given or that Randleman waived them. *Miranda*, 384 U.S. at 475; *Carnley v. Cochran*, 369 U.S. 506, 516 (1962); *United States v. Ramirez*, 710 F.2d 535, 542 (9th Cir. 1983); *Sullivan v. Alabama*, 666 F.2d 478 (11th Cir. 1982). Thus, it must be concluded that Randleman was not mirandized before her psychiatric evaluation. Since she was not mirandized, she could not and did not waive her rights, and therefore there is nothing to exempt her inculpatory statements from the prohibition of *Smith*.

Third, and contrary to the Arkansas Supreme Court's observation that the forensic report which contained Randleman's statements was introduced "for the limited purpose of impeaching" her, 310 Ark. at 417, 837 S.W.2d at 452, it was admitted into evidence with no limiting instruction whatsoever and no admonishment to the jury that the statements in the report could only be considered in passing upon Randleman's credibility and not as substantive evidence of her guilt. *Cf. Harris v. New York*, 401 U.S. 222 (1971) (non-mirandized statements may be used for impeachment in absence of

coercion and if proper limiting instruction is given). *See also Hinman v. McCarthy*, 676 F.2d 343, 349 (9th Cir. 1982) (where limiting instruction was not given, "*Harris* does not obviate the problem"); *United States v. Whitson*, 587 F.2d 948, 953 (9th Cir. 1978) ("[i]n no case is it permissible for the jury to use the impeaching evidence in deciding the defendant's guilt or innocence, . . .")

Fourth, in no way did Randleman "open the door" to the State's use of her statements. Under *Buchanan v. Kentucky*, 483 U.S. 402, 422 (1987), a defendant waives her right to raise an *Estelle v. Smith*-based Fifth Amendment objection only if she requests the psychiatric examination or presents psychiatric evidence at trial. *See also Schneider v. Lynaugh*, 835 F.2d 570, 576 (5th Cir. 1988) ("the defendant must introduce mental-status evidence that may fairly be characterized as expert testimony before the prosecution may respond with the results of a psychiatric examination"). Here, Randleman did not request the psychiatric examination and indeed specifically objected to it. She also unequivocally stated to the trial court that she was not asserting a defense of mental disease or defect. Finally, she presented no mental-status evidence which could be fairly chracterized as expert testimony at the trial. Thus, a *Buchanan*-based "waiver" cannot be found in this case.

In sum, Randleman's case is on all fours with *Estelle v. Smith*, 451 U.S. 454 (1981). Indeed, the facts in Randleman's case are even more compelling than those in *Smith*. In this case, Randleman's statements were actually introduced into evidence, while in *Smith* the state psychiatrist only recounted his conclusions based upon the statements that Smith gave. The role of

the psychiatrist in Randleman's case was also "that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *See Smith*, 451 U.S. at 467. The State failed to show that Randleman was mirandized prior to the psychiatric examination, or that she waived any rights at all. It introduced her statements as substantive evidence of guilt, and Randleman did not open the door to the State's use of her statements.

The decision below is thus contrary to *Smith*. The Arkansas Supreme Court acknowledged Randleman's reliance upon *Smith* and, as discussed *supra*, sought to distinguish it, but the court essentially treated the entire issue as one of admissibility under state evidence law relating to the physician and psychotherapist-patient privilege rather than as one of constitutional dimension under the Fifth Amendment. In doing so, the court paid little more than lip service to the constitutional prohibition against governmental compulsion and overreaching.

II.

HARRIS V. NEW YORK AND LIMITATIONS ON IMPEACHMENT

Even if this Court accepts the incorrect observation of the court below that the forensic report was introduced for the limited purpose of impeaching Randleman, the decision is still contrary to the decisions of this Court under the Fifth Amendment. It also conflicts with the decisions of other lower federal courts under Fed. R. Crim. P. 12.2(c) holding that non-mirandized,

involuntary statements may not be used by the prosecution for any purpose.

A. Judicially compelling the accused to submit to a competency examination is tantamount to coercion.

In *Harris v. New York*, 401 U.S. 222, 224 (1971), this Court held that statements taken in violation of Fifth Amendment prophylactic rules, while inadmissible in the prosecution's case in chief, may nevertheless be used to impeach the defendant's conflicting testimony if the statements' "trustworthiness . . . satisfies legal standards." However, to be admissible for impeachment purposes, the statements must have been made in the absence of coercion. "[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law, ..." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). (Emphasis in original)

For purposes of determining whether a statement is admissible for impeachment purposes under *Harris*, this Court has long recognized that coercion may take many forms. "[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (citing *Chambers v. Florida*, 309 U.S. 227 (1940)). As long ago as 1897, this Court announced that a confession is involuntary if it was "extracted by any sort of threats or violence [o]r obtained by any direct or implied promises, however slight, [o]r by the exertion of any improper influence."

Bram v. United States, 168 U.S. 532, 542-43 (1897). More recently in *New Jersey v. Portash*, 440 U.S. 450, 459 (1979), the Court held that testimony given in response to a grant of legislative immunity "is the essence of coerced testimony" and may not be used to impeach a defendant at his subsequent trial.

In Randleman's case, the statements made by her to the examining psychiatrists pursuant to the trial court's order compelling her to submit to the exam were no less compelled for Fifth Amendment purposes than the statements at issue in *Portash*. This is so because the only effective means by which an examining psychiatrist can determine an accused's sanity is through candid conversation with the accused, as the lower courts have uniformly recognized. *See, e.g., United States v. Leonard*, 609 F.2d 1163, 1165-66 (5th Cir. 1980):

> In many cases, psychiatrists would not be able to obtain reliable testimony unless they were free to inquire into the prior conduct of the defendant, including his participation in the criminal activity with which he is charged. Moreover, the psychiatric inquiry cannot succeed unless the defendant cooperates; a defendant's mental condition would not be discovered in many instances unless the psychiatrist can engage in a candid conversation with the defendant about it.

See also United States v. Allbright, 388 F.2d 719, 724-25 (4th Cir. 1968) (a lengthy personal interview is the only effective means of ascertaining sanity); *Collins v. Auger*, 577 F.2d 1107, 1110 (8th Cir. 1978), *cert. denied*, 439 U.S. 1133 (1979) ("[i]f a defendant exercised his right to

remain silent and refused to cooperate with the psychiatrist the likelihood of a meaningful and reliable examination would be considerably decreased and his opportunity to wage a possible defense thwarted"); *People v. Galimanis*, 765 P.2d 644, 647 (Colo. Ct. App. 1988) ("it would be nearly impossible to evaluate a person's sanity without making inquiry"). The State's own expert in Randleman's case also agreed, stating that "[i]t is important as a part of the clinical evaluation to actually talk to the patient" and acknowledging that what is said by the patient can be very important in reaching a conclusion as to sanity. (T. 404)

In sum, it is difficult to imagine a clearer example of "compelled" statements than those that are given in the course of a court-ordered psychiatric exam. In order for the accused to comply with both the letter and the spirit of the court's order, she must cooperate and communicate with the psychiatrists whose job it is to undertake a meaningful evaluation of the accused's mental condition. "The Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination." *Portash*, 440 U.S. at 459. If the accused exercises her right to remain silent during a judicially compelled competency evaluation, she risks the sanction of contempt and also forfeits her right to seek out a defense of mental disease which the trial court itself, in ordering the examination in the first place, believed might be available.

Statements made during the course of a court-ordered psychiatric examination are thus compelled for Fifth Amendment purposes, and it is constitutionally

impermissible for the prosecution to use them for any purpose. And, unlike the situation in *Harris* but like the situation in *Portash*, this situation involves "the constitutional privilege against self-incrimination in its most pristine form." *Portash*, 440 U.S. at 459. Thus, the approach endorsed in *Harris* of balancing the incremental deterrence of police illegality against the strong policy against countenancing perjury "is not simply unnecessary. It is impermissible." *Id.*

B. The procedure below conflicts with the limitations on impeachment imposed by the federal courts under Fed. R. Crim. P. 12.2(c) and the Fifth Amendment.

Additionally, if Randleman's case had gone to trial in federal court rather than state court, Fed. R. Crim. P. 12.2(c) would have prevented the prosecution from using Randleman's statements for any purpose. That rule provides in relevant part:

> No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony.

As the Fifth Circuit stated in *United States v. Leonard*, 609 F.2d 1163, 1165 (5th Cir. 1980):

> The rule reflects a clear congressional intent that such statements not be used in a proceeding on the issue of guilt, but rather that they be used solely on the issue of sanity. As the legislative history makes clear, the purpose of Rule 12.2(c) is to secure the defendant's Fifth Amendment right against self-incrimination. *See* Historical Note, following 18 U.S.C. Rule 12.2.

The court also concluded that the rule prohibits the prosecution from using the statements even for impeachment purposes:

> We conclude that a firm rule that prevents the prosecution from relying on statements of a defendant given during the course of a compelled psychiatric examination for impeachment purposes not only protects the integrity and reliability of the psychiatric interview but also prevents infringement on the defendant's Fifth Amendment rights.

Id. at 1167. Obviously, Fed. R. Crim. P. 12.2(c) was designed to protect the defendant's privilege against self-incrimination under the Fifth Amendment. *See* Conference Committee Notes, House Report No. 94-414 ("[t]he last sentence of subdivision (c) has been amended to more accurately reflect the Fifth Amendment considerations at play in this context").

In promulgating Fed. R. Crim. P. 12.2(c), Congress essentially codified this Court's holding in *Estelle v. Smith*, 451 U.S. 454 (1981). A defendant in federal court can invoke Rule 12.2(c) to prevent the prosecution from using her statements for impeachment purpos-

es, and there is no reason why a defendant in state court should be entitled to any less protection under the Fifth Amendment. In this case, Randleman's statements were not used solely on the issue of sanity. To the contrary, Randleman's sanity was not even an issue at trial. Thus, the decision below is contrary to this Court's rulings and the codification of those principles in Fed. R. Crim. P. 12.2(c).

III.

UNCONSTITUTIONALLY FORCING THE ACCUSED TO TRADE ONE RIGHT FOR ANOTHER

The decision below also runs afoul of the principle that an accused in a criminal case may not be forced to sacrifice one constitutional right in order to assert another. *Simmons v. United States*, 390 U.S. 377 (1968).

In *Collins v. Auger*, 577 F.2d 1107 (8th Cir. 1978), the Eighth Circuit addressed a situation virtually identical to Randleman's and concluded that the defendant's due process rights were violated by the introduction into evidence of statements made during a court ordered competency examination. The court adopted the district court's finding that the use of the statements unconstitutionally forced the defendant to choose between asserting his Fifth Amendment privilege against self-incrimination during the competency examination and his due process right to seek out a possible defense of mental disease or defect:

> [I]t is fundamentally unfair to use defendant's incriminating admissions to a psychiatrist during a

psychiatric examination as part of the prosecution's case to establish his guilt. . . .

The defendant is entitled to raise his mental condition at the time of the offense as a defense. He is also entitled, under proper circumstances, to an examination to determine his competency to stand trial. Psychiatric examinations are essential to the proof of his mental condition. An indigent must seek a court order authorizing the examination and the payment of its cost. If the giving of a *Miranda* warning satisfied requirements of the Fifth Amendment and the Fourteenth Amendment and made the defendant's incriminating admissions admissible, the defendant would be placed in a situation where he must sacrifice one Constitutional right to claim another.

If a defendant cooperated with the psychiatrist and made a full disclosure of his thinking processes and his background, including incriminating statements and if he failed to establish his lack of mental capacity, he would be faced with these admissions on trial. If a defendant exercised his right to remain silent and refused to cooperate with the psychiatrist the likelihood of a meaningful and reliable examination would be considerably decreased and his opportunity to urge a possible defense thwarted. A defendant should not be compelled to choose between exercising his Fifth Amendment right not to incriminate himself and his due process right to seek out available defenses.

Id. at 1109-1110 (quoting *Collins v. Auger*, 428 F.Supp. 1079, 1082-83 (S.D. Iowa 1977)). *See also Stethen v. Nix*,

885 F.2d 456, 461-62 (8th Cir. 1989) (Heaney, J., dissenting):

> [A]llowing a psychiatrist to relate to a jury statements made by a defendant in the course of an examination, even if admitted to rebut the defendant's own testimony, violates his due process rights. . . . To allow a psychiatrist to reiterate statements made to him is to force a defendant to choose between his privilege against self-incrimination and his right to assert an insanity defense at trial.

In *Simmons*, this Court held that testimony at a suppression hearing to establish standing may not be used at trial because the defendant is compelled to testify in order to establish standing. In doing so, the Court used language that is also pertinent here:

> Those courts which have allowed the admission of testimony given to establish standing have reasoned that there is no violation of the Fifth Amendment's Self-Incrimination Clause because the testimony was voluntary. As an abstract matter, this may well be true. A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up a benefit. When this assumption is applied to a situation in which the

> "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obligated to either give up what he believed, with the advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

390 U.S. at 393-94 (footnotes omitted). Similarly, in the present case Randleman was forced to either exercise her right to remain silent during the competency examination and thereby give up her due process right to seek out a possible defense of mental disease, or waive her right to remain silent and be faced with her admissions at trial. That is exactly the kind of situation that this Court in *Simmons* condemned as unconstitutional.

CONCLUSION

Randleman's Fifth and Fourteenth Amendment rights were violated at her trial. The petition for writ of certiorari should be granted and the convictions vacated pursuant to *Smith, Portash*, and *Simmons*.

Respectfully submitted,

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January 19, 1993

APPENDIX

Randleman v. State, 310 Ark. 411,
837 S.W.2d 449 (1992) A1

ELLEN MAE RANDLEMAN

v.

STATE OF ARKANSAS

CR 92-264

Supreme Court of Arkansas
Opinion Delivered September 21, 1992
[310 Ark. 411, 837 S.W.2d 449 (1992)]

Appeal from Stone Circuit Court; John Dan Kemp, Judge; affirmed.

STEELE HAYS, Justice. This is an appeal from a jury verdict convicting Ellen Mae Randleman of two counts of delivery of a controlled substance and four counts of possession of a controlled substance with intent to deliver, resulting in sentences totalling twenty-three (23) years in the Arkansas Department of Correction.

On appeal, Ms. Randleman challenges the trial court's order that she be evaluated at the State Hospital pursuant to Ark. Code Ann. § 5-2-305(d)(1-5)(Supp. 1991) and its ruling that inculpatory statements made by her to the State Hospital psychiatric examiners were admissible for purposes of impeachment under an exception to the psychotherapist-patient privilege contained in Ark. R. Evid. 503(d)(2). Ms. Randleman contends that the court order for psychiatric evaluation and the admission of the statements in the psychiatric forensic report violated her Fifth Amendment right

against self-incrimination and her Fourteenth Amendment due process right.

Ellen Mae Randleman was employed as an undercover police officer. She worked with Rick Adamson, an undercover paid informant for the drug task force. Randleman and Adamson had worked together on some ten cases in Stone and Izard Counties when her father was diagnosed as being terminally ill with cancer. Shortly after her father's death in April 1989, Randleman contacted Adamson to ask the worth of her father's remaining narcotic prescription drugs. Later, she gathered all of her father's medicine, took it to Adamson and asked him to sell it for her.

On or about July 19, 1989, Adamson contacted Steve Brondhaver, Chief Deputy for Stone County, and informed him of the appellant's actions. On July 20, 1989, Adamson and Brondhaver met with Lonnie Cox, a special agent with the FBI. Later that evening, Adamson met Brondhaver at the Stone County Police Department and delivered the drugs to him. He was interviewed by Brondhaver, Dale Weaver, administrator of the drug task force, and Jack Yancey, sheriff of Izard County, at Yancey's house. Adamson then recorded a telephone conversation with appellant in which he told her he had sold some of the drugs and had the money for her. They made arrangements for her to go to Adamson's house later than evening and be paid five hundred dollars ($500.00). Randleman arrived at Adamson's house at approximately 9:15 p.m. and collected her money. The conversations of Randleman and Adamson were also recorded.

After leaving the residence Ms. Randleman was arrested. During an inventory search of her car, Weaver and Brondhaver recovered the money given to Randleman for the drugs. In a recorded statement immediately after her arrest, appellant stated that her father's death had been an extreme financial drain on her family and that she had obtained the controlled substances in an effort to sell them and acquire some badly needed money.

Ms. Randleman filed three consecutive motions for a continuance upon an allegation that she was "undergoing intensive psychological testing and evaluation," all of which were granted. Additionally, she indicated an intention to call a clinical psychiatrist as a defense witness, and she alleged that the state did not perform the necessary psychological testing and evaluation before she was employed as an undercover operator. At that point the state filed a motion for a psychiatric evaluation of Ms. Randleman at the Arkansas State Hospital. The trial court granted the motion over an objection that the defense of mental disease or defect had not been raised. In due course, the Arkansas State Hospital reported that Ms. Randleman was fit to proceed and had the capacity to conform her conduct to the requirements of the law.

I

THE TRIAL COURT ERRED IN ORDERING THE APPELLANT TO BE EVALUATED BY THE ARKANSAS STATE HOSPITAL

The actions of the trial court in ordering the psy-

chiatric examination of the appellant are covered by statute. Specifically, Ark. Code Ann. § 5-2-305 (Supp. 1991) provides:

> (a) Whenever a defendant charged in circuit court:
> (1) Files notice that he intends to rely upon the defense of mental disease or defect, *or there is reason to believe that mental disease or defect of the defendant will or has become an issue in the cause*; or
>
> (2) Files notice that he will put in issue his fitness to proceed, *or there is reason to doubt his fitness to proceed*, the court, subject to the provisions of §§ 5-2-304 and 5-2-311, shall immediately suspend all further proceedings in the prosecution. . . [Emphasis added.]

There are, as well, relevant provisions in Ark. Code Ann. § 16-86-102(a) (1987):

> (a) Whenever a prosecution for any crime has been instituted in the circuit court by indictment or information and the defense of insanity at the time of the trial or at the time of the commission of the offense has been raised on behalf of the defendant and becomes an issue in the cause, or the circuit judge has reason to believe that the defense of insanity will be raised on behalf of the defendant and will become an issue in the cause *or shall be of the opinion that there are reasonable grounds to believe that the defendant was insane at the time of the alleged commission of the offense*, the judge shall postpone all other proceedings in

> the cause and shall either enter an order directing that the defendant undergo examination and observation by one (1) or more qualified psychiatrists at a local regional mental clinic or center or shall commit the defendant to the Arkansas State Hospital for examination and observation. [Emphasis added.]

[1] In addition to the statutory authority to require a psychiatric examination whenever necessary, the trial court has the inherent authority to raise the defense of mental disease or defect if it has reason to doubt a defendant's fitness to proceed. *See Hudson v. State*, 303 Ark. 637, 799 S.W.2d 529 (1990); *Griffin v. State*, 25 Ark. App. 186, 755 S.W.2d 574 (1988).

[2] The appellant's argument is based on the fact that she did not raise a competency defense and her mental fitness was not at issue. She argues that her intention to introduce psychological evidence as to her ability to meet the state's standards to be a certified undercover officer is not the same as asserting an incompetency defense or an insanity plea. Appellant cites *Schantz v. Eyman*, 418 F.2d 11 (9th Cir. 1969) and *Davis v. Campbell*, 465 F.Supp. 1309 (1979), but these cases are off the mark. They do state that an accused may not be compelled to submit to a pretrial psychiatric examination by the state courts, but the decisions are based on misconduct by the prosecution and involve the right to have counsel present during a pretrial mental examination. In contrast, here there was good reason to doubt the appellant's fitness to proceed and to believe that mental disease or defect could become an issue based on appellant's three motions for continuances

alleging that she was "undergoing intensive psychological testing and evaluation."

Also, appellant requested the file of Dr. David C. Loe, a psychologist who examined her when she worked for the Judicial Task Force. The state anticipated that the defense might use an initial report in which Dr. Loe recommended the appellant for police work but stated that she might be somewhat naive. In addition, appellant listed Alan G. Tufts, a clinical psychologist in Rogers, Arkansas, as a witness to be called at trial.

Finally, in her response to the state's motion for discovery, the appellant stated that she would "defend on the ground of general denial and that the State did not perform the necessary psychological testing and evaluation of the defendant before employment as an undercover operator."

Although the results of the psychiatric evaluation revealed that the appellant had the capacity to appreciate the criminality of her conduct at the time of the offense charged and was capable of cooperating with her attorney in the preparation of her defense, the trial court did not err in ordering the examination. It was not unreasonable for the trial court to anticipate that the mental condition of the appellant might become an issue in the case.

II

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE THE RESULTS OF THE COURT ORDERED FORENSIC EXAMINATION FOR THE

PURPOSES OF IMPEACHMENT

During its case in chief, the state attempted to offer the statements the appellant made to Dr. Wendell O. Hall during her evaluation at the State Hospital. The appellant objected to Dr. Hall's testimony concerning appellant's inculpatory statements. When the state attempted to introduce the forensic report, the appellant objected and the court sustained the objection. Appellant testified in her own behalf and during cross examination, the state attempted to impeach her by using the statements in the forensic report. Defense counsel again objected but the trial court overruled the objection and allowed the introduction of the forensic report. The state then used the forensic report to point out inconsistencies between the statements in the report and the appellant's testimony at trial. Ark. Code Ann. § 5-2-307 (1987) states as follows:

> Any statements made by a person during examination or treatment shall be admissible as evidence only to the extent permitted by the Uniform Rules of Evidence, but only if such statement is constitutionally admissible.

Ark. R. Evid. 503(b) provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons

who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(d) Exceptions:

(2) Examination by order of court. If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

[3] Thus, a patient has a privilege to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his mental or emotional condition. *See Gruzen v. State*, 267 Ark. 380, 591 S.W.2d 342 (1979), cert. denied, 449 U.S. 852, 101 S.Ct. 144, 66 L.Ed.2d 64 (1980), 459 U.S. 1020, 103 S.Ct. 386, 74 L.Ed.2d 517 (1982). But Rule 503(b) does not grant a privilege to "any information," only "communications" between the patient and doctor, and confidential ones at that. *Baker v. State*, 276 Ark. 193, 637 S.W.2d 522 (1982).

Appellant relies on *Estelle v. Smith*, 451 U.S. 454 (1981). In *Estelle*, the United States Supreme Court held that the admission of a psychiatrist's testimony at the penalty phase violated respondent's Fifth Amendment privilege against compelled self-incrimination because he was not advised before the pretrial psychiatric examination that he had a right to remain silent and

that any statement he made could be used against him at a capital sentencing proceeding.

[4,5] *Estelle* is distinguishable because the prosecutor there used the information to prove future dangerousness at the sentencing hearing. In the present case, the forensic report was used for the limited purpose of impeaching the appellant. Also, the court's decision in *Estelle* was based on the fact that the defendant was not given *Miranda* warnings prior to the psychiatric examination. Although the record in the case at bar is silent with respect to *Miranda* rights prior to the evaluation, appellant did not raise the issue at the trial court level.

The record reveals that appellant's testimony clearly contradicted her statements at the state hospital. She testified that her supervisor, Dale Weaver, knew of her plan to get Rick Adamson to buy the drugs from her as a way to build credibility within the drug culture. She also stated that she had lied in her original statement to the police. Due to these prior inconsistent statements, the evaluation report was necessary to connect the statements appellant gave to the state hospital personnel with those she made on the tapes and in her statement to the police.

[6] We believe the statement at the hospital came within the exception provided in Ark. R. Evid. 503(d)(2) for examinations by order of the court. It seems logical that communications made to a psychiatrist should not be privileged when the court initiated the examination. Weinstein comments on this subject as follows:

> The second exception--for court ordered

> examinations--is necessary for the effective utilization of this important and developing procedure. "(T)he purpose of the examination would be totally frustrated if the examined party's revelations to the psychotherapist were privileged." It is arguable that such an exception need not even have been included in the rule, either because a patient examined on court order is not consulting a psychotherapist "for purposes of diagnosis or treatment" or because these circumstances negate confidentiality. The exception is effective only with respect to the particular purpose for which the examination is ordered."

Jack B. Weinstein, Margaret Berger, *Weinstein's Evidence*, § 504(07), at 504-33 (1980). [Citations omitted.]

We think some analogy can be found between this case and those instances where custodial statements by an accused are rendered inadmissible (as, for example, lack of a timely arraignment), but may nevertheless be used to impeach the defendant whose trial testimony contradicts such statements, provided the statements were not the product of coercive police tactics. *Muncey v. Arizona*, 437 U.S. 385 (1978). No such stigma is suggested in this case.

[7] We conclude appellant's Fifth Amendment right against self-incrimination and her Fourteenth Amendment due process rights were not violated by the use of the psychiatric forensic report to impeach her testimony.

Affirmed.